Supreme Court, U.S.
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No. 95- 1549

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

SAM ZHADANOV,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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March 1996

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QUESTIONS PRESENTED

1. May a person properly be charged under 21 U.S.C. § 846 with conspiracy to aid and abet the distribution of a controlled substance on the basis that he contracted with retail store owners to manufacture a legal product, knowing that the product would be resold to unknown drug dealers to facilitate their illegal distribution activities?

2. Can a guilty plea to charges of conducting financial transactions with the proceeds of drug distribution under 18 U.S.C. § 1956(a)(1) stand, where the "factual basis" for the plea shows that the charged transactions were conducted not with drug proceeds but with the proceeds of the sale of wholesale quantities of crack vials, which is not a "specified unlawful activity" as defined in id. § 1956(c)(7)?

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LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Zhadanov and the United States). Co-defendant Henry Belkin pleaded guilty almost two years ago but has yet to be sentenced. Co-defendant Edelson's appeal was consolidated with

2. This case presents an important unresolved question of federal criminal statutory interpretation underlying what it takes to establish a factual basis to believe that property involved in a financial transaction "in fact involved the proceeds of" drug distribution, a necessary element of a money laundering charge under 18 U.S.C. § 1956. 21

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SAM ZHADANOV respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 22, 1995, affirming his convictions for conspiracy to aid and abet the distribution of a controlled substance and related money laundering.

OPINIONS BELOW

The amended judgment of the United States Court of Appeals for the Third Circuit (per Becker, J., with Alito, J., and Vanaskie, D.J.), affirming the petitioner's convictions and sentence in the United States District Court for the Eastern District of Pennsylvania, was entered on December 22, 1995. Appx. A. Several of the issues raised on appeal were decided in an earlier partial judgment amended and entered on October 31, 1995. Appx. B. The court of appeals wrote no opinion. The district court's unpublished opinion denying a pretrial motion to dismiss as to one issue raised in this petition is reproduced as Appendix C. It is not published.

JURISDICTION

The amended final judgment of the United States Court of Appeals for the Third Circuit was entered on December 22, 1995. Rehearing was not sought. This petition is filed on or before the ninetieth day thereafter. Rule 13.1.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF STATUTES AND RULE INVOLVED

Section 2 of Title 18, United States Code, provides, in pertinent part:

> **§ 2. Principals**
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Section 1956 of Title 18, United States Code, provides, in pertinent part:

> **§ 1956. Laundering of monetary instruments.**
>
> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity --
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
>
> (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> (B) knowing that the transaction is designed in whole or in part --

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(3) Whoever, with the intent --

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source ownership, or control of property believed to be proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirements under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation

made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

* * * *

(c) As used in this section --

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form,though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

* * * *

(7) the term "specified unlawful activity" means --

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31[1];

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[1] The definition of "racketeering activity" under 18 U.S.C. § 1961(1)(D), part of the RICO statute, includes: "any offense involving ... the felonious manufacture, importation, receiving, concealment, buying, selling, or

* * * *

(C) an act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under [any of various inapplicable] section[s] of this title, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), ..., section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), ...;

* * * *

Title 21 of the United States Code provides, in pertinent part:

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; ....

_____(cont'd)

otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States."

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

§ 863. Drug paraphernalia

(a) In general

It is unlawful for any person --

(1) to sell or offer for sale drug paraphernalia;

(2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or

(3) to import or export drug paraphernalia.

Penalties

(b) Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined under Title 18.

* * * *

Definition of "drug paraphernalia"

(d) The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding converting, concealing, producing,

processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as --

(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips; meaning objects used to hold burning material, such as marihuana cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

(7) chamber pipes;

(8) carburetor pipes;

(9) electric pipes;

(10) air-driven pipes;

(11) chillums;

(12) bongs;

(13) ice pipes or chillers;

(14) wired cigarette papers; or;

(15) cocaine freebase kits.

Matters considered in determination of what constitutes drug paraphernalia

(e) In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning its use;

(2) descriptive materials accompanying the item which explain or depict its use;

(3) national and local advertising concerning its use;

(4) the manner in which the item is displayed for sale;

(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;

(7) the existence and scope of legitimate uses of the item in the community; and

(8) expert testimony concerning its use.

* * * *

Federal Rule of Criminal Procedure 11(f) provides:

> **Rule 11. Pleas**
>
> **(f) Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

STATEMENT OF THE CASE

The petitioner, Sam Zhadanov, received a 60-month sentence for drug conspiracy and related money laundering, because he knowingly manufactured commercial quantities of "crack vials," that is, plastic tubes designed for use in the distribution of crack cocaine. This petition challenges the government's theory of drug conspiracy and the factual basis for the money laundering charges and attendant forfeitures.

A. Procedural History

On May 13, 1993, a grand jury in the Eastern District of Pennsylvania returned a 213-count indictment naming nine defendants. The petitioner Sam Zhadanov was charged in the conspiracy count only. On October 21, 1993, the grand jury returned a 291-count superseding indictment, charging the same nine defendants. Petitioner was named in 80 counts.[2]

The defense filed pretrial motions, including a motion to dismiss the super-

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[2] He was named but not charged in several other counts.

seding indictment for failure to allege an offense under either the conspiracy or money laundering statutes. By Memorandum and Order dated December 8, 1993, the district court (Thomas N. O'Neill, Jr., U.S.D.J.) denied the motion to dismiss. Appendix C.

On December 30, 1993, Mr. Zhadanov pleaded guilty before United States District Judge Anita B. Brody to 62 counts. Specifically, pursuant to a plea agreement, he pleaded guilty to: (a) joining a conspiracy in violation of 21 U.S.C. § 846 to distribute cocaine base and to sell drug paraphernalia (Count 1), (b) conducting a monetary transaction ("that is, accept[ing] U.S. Postal Money Orders in the approximate amount of $12,000 and $12,000 in U.S. currency") with what was "represented to be the proceeds" of drug sales, in violation of 18 U.S.C. § 1956(a)(3)(A) (Count 195), and (c) additional counts of money laundering in violation of § 1956(a)(1)-(A)(i) and (B)(i) (Counts 232-291). Petitioner also pleaded guilty to two criminal forfeiture counts, one under 21 U.S.C. § 853 (drug forfeiture, Count 199) and one under 18 U.S.C. § 982 (money laundering forfeiture, Count 208).

On August 8, 1994, at sentencing, Judge O'Neill determined a guideline range of 168-210 months, predicated on the use of USSG § 2D1.1, the guideline for drug distribution cases. Granting the government's departure motion,[3] the

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[3] The sentencing court did not depart downward on the additional ground stipulated as appropriate in the plea

district court then imposed sentence of 60 months' incarceration, concurrent on all counts, followed by five years' supervised release (three years on the money laundering counts), with $3100 in special assessments and no fine.

Judgment of sentence was formally entered on August 9.[4] On August 17, 1994, petitioner filed a timely notice of appeal. Bail pending appeal was denied. Petitioner voluntarily surrendered to serve his sentence.

On appeal, after argument, the Third Circuit affirmed by judgment order.

_____(cont'd)

agreement, that a conviction for conspiracy to aid and abet the distribution of drugs, based solely on sale of paraphernalia, is an atypical case of drug conspiracy and should properly be sentenced more like a paraphernalia case than like a conspiracy to distribute thousands of kilograms of crack. See United States v. Posters 'n' Things, Ltd., 969 F.2d 652, 663-64 (8th Cir. 1992), aff'd on other grds., Posters 'n' Things, Ltd. v. United States, 511 U.S. --, 128 L.Ed.2d 539, 114 S.Ct. 1747 (1994).

[4] The order of criminal forfeiture had been entered April 8, 1994. On August 9, the government filed a motion to amend the judgment to incorporate the forfeiture, which motion was granted that day. The final judgment of forfeiture was not filed until October 12, however, and was entered on October 13, 1994. Execution of the judgment of forfeiture has been stayed pending appeal.

After permitting supplemental briefing on the issues then pending before this Court in Libretti,[5] the court of appeals issued its summary affirmance on the other issues September 26, 1995, as amended October 31, 1995. Appx. A. The Libretti issues were summarily denied by supplemental amended judgment order filed December 22, 1995. Appx. B.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The district court's subject matter jurisdiction was invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and was timely invoked by Notice of Appeal filed within ten days after entry of the judgment of sentence. Fed.R. Crim.P. 4(b).

B. Statement of Facts

Petitioner Sam Zhadanov is an inventor and engineer who owned a plastics mold-injection factory, Vortex Products Corp., of Metuchen, New Jersey. A naturalized American citizen who emigrated from the USSR, petitioner is 68 years old, married for over 35 years, and the father of a grown son. In the summer or fall of 1990, co-defendants Henry Belkin and Leonard Edelson approached him to produce small vials, which were originally represented to petitioner to be perfume sample holders. Belkin and Edelson intended to sell the vials to

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[5] See Libretti v. United States, 516 U.S. --, 133 L.Ed.2d 271, 116 S.Ct. 356 (1995).

crack cocaine dealers through electronics and jewelry stores they owned in New York City and Philadelphia.

By late 1990 production was under way, and Belkin and Edelson began distributing the vials in the two cities. Petitioner was never their partner and never received a share of those profits; rather, he received a fixed, negotiated price for each carton of vials that he manufactured and sold. Belkin and Edelson paid petitioner through an account in the name of Tri-State General, Inc. Petitioner's receipt and deposit of those checks were charged in dismissed Counts 214-232, covering the period from November 30, 1990, to June 4, 1991, to which he did not plead guilty; petitioner has denied guilty knowledge during most or all of that time period.

After their primary Philadelphia customer was raided in May 1991 and some 9 million Vortex-made vials were seized, Belkin and Edelson informed petitioner of the true nature of their business. Nevertheless, he continued to participate, knowing the vials would be used in the street distribution of crack cocaine. During this latter period, he was paid in cash, which he turned over to co-conspirator Alexander Srebianski; Srebianski in turn deposited the money into an account called U.S. Alexander, and then paid petitioner with checks for "merchandise." The deposit of those checks, dated from July 1991 to May 1993, is charged as money laundering in Counts 232 to 291, to which petitioner pleaded guilty.

REASONS FOR GRANTING THE WRIT

1. The circuits are divided on the question whether, under this Court's decisions in United States v. Falcone, 311 U.S. 205 (1940), and Direct Sales Co. v. United States, 319 U.S. 703 (1943), persons who manufacture and sell to retailers materials known to be useful to drug dealers can be convicted of conspiring to aid and abet the distribution of drugs.

The Court should grant a writ of certiorari in this case to address important issues concerning the scope of the federal drug conspiracy law. By pretrial motion to dismiss the Count One conspiracy, petitioner challenged the theory under which he was charged with conspiracy to distribute crack cocaine. The indictment charged him with conspiring to aid and abet the distribution activities of unnamed crack dealers, in that he manufactured vials for sale to retail store owners, knowing that the vials would be resold to drug dealers for use in packaging doses for users. The motion to dismiss was based on United States v. Superior Growers Supply, Inc., 982 F.2d 173 (6th Cir. 1992), concerning the requirements for a sufficient allegation of a conspiracy to aid and abet.[6]

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[6] Count One charged a second objective, namely, to manufacture drug paraphernalia in violation of 21 U.S.C. § 863. In its brief in the court of appeals the government reversed positions on this aspect, contending (in order to avoid an argument that petitioner should have been

Count One of the Superseding Indictment in this case charged petitioner and others with conspiring to "aid and abet the distribution of more than 10,000,000 grams of 'crack' cocaine, in violation of Title 21, United States Code, Section 841(a)(1); and ... [to] sell more than 200,000,0000 [sic] 'crack' vials, in violation of Title 21, United States Code, Section 863(a)." In other words, petitioner was not accused of conspiring with crack dealers to distribute crack, but rather of conspiring with the others who were involved in the manufacture and sale of vials to assist in that way the drug dealers' crack distribution.

_____(cont'd)

sentenced by reference to the Sentencing Guidelines provision for paraphernalia cases, rather than treated as a major drug dealer) that crack vials do not come within the statutory definition of "drug paraphernalia." Gov't Br. 52-54, citing United States v. Hong-Liang Lin, 962 F.2d 251 (2d Cir. 1992) (crack vials are not used either to make or to ingest illicit drugs, and do not serve to "conceal" the drugs they contain, because they are made of clear plastic; thus, they are not within any part of the definition of "drug paraphernalia" under § 863(d); see Statutes Involved, at 6-7, ante). This had been part of the petitioner's position in support of his motion to dismiss. If the § 841 objective is invalidated in this proceeding, the case should be remanded to the Third Circuit to strike the second objective as well, or at least for consideration of the ramifications of the government's changed position.

To conspire to aid and abet another's offense is to enter into an agreement to associate oneself willfully and knowingly with that venture, agreeing to participate in it in some way so as to seek by some action of one's own to help make it succeed. Nye & Nissen Corp. v. United States, 336 U.S. 613, 619 (1949).

The question in this case, and in cases of this kind, is whether the attenuated relationship between the alleged conspirators' conduct and that of the crack dealers is such as to make the vial manufacturer an aider and abettor of the unknown and unidentified dealers who ultimately buy and use the vials for street sales. A variant of this important question (posed with respect to the sufficiency of evidence to establish a conspiracy by suppliers of paraphernalia to aid and abet their drug dealer customers) was accepted for review in Posters 'n' Things, Ltd. v. United States, 511 U.S. --, 128 L.Ed.2d 539, 114 S.Ct. 1747 (1994), but not addressed in the Court's opinion, because the petitioner in that case abandoned the issue by failing to brief it. See 128 L.Ed.2d at 553.

In Superior Growers Supply, supra, 982 F.2d 173, on which the petitioner's motion to dismiss was predicated, the Sixth Circuit affirmed the dismissal of an indictment like petitioner's. There, the court of appeals held:

> that in order to conspire or agree to assist 'X' in the manufacture of marijuana, 'Y and Z' have to know that 'X' is manufacturing marijuana or planning to. Otherwise, all 'Y and Z' are agreeing

> to do is to aid and abet a 'possibility,' or a 'criminal wish'; which simply isn't a crime.
>
> ... Without the underlying crime, there can be no knowledge or intent to further it. The necessary and inescapable conclusion then is that the occurrence of the underlying crime has to be an essential element of such a charge because otherwise the requisite knowledge and intent to further the substantive offense cannot exist. By deconstructing the charge in the indictment, the seeming paradox of a conspiracy charge which requires proof of the commission of the underlying crime is harmonized. We therefore find that the indictment in this case fails the 'essential elements' requirement of Hamling [v. United States, 418 U.S. 87, 117 (1974)]
> ....

982 F.2d at 178. The Sixth Circuit found support for this analysis in its analysis of this Court's decisions in Direct Sales Co. v. United States, 319 U.S. 703 (1943), and United States v. Falcone, 311 U.S. 205 (1940).

The Falcone case involved a prosecution for conspiracy to violate the revenue laws related to illegal distilleries, brought against distributors of

yeast, sugar and cans who knew of their customers' illegal activities. This Court affirmed the reversal of the respondents' convictions, finding the evidence insufficient to show the required knowledge of the existence of the conspiracy among the still operators that they were said to have joined. The Court held that:

> one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge.

311 U.S. at 210-11.

In Direct Sales, on the other hand, this Court upheld the conviction of a licensed manufacturer and wholesaler of a controlled substance for supplying vast quantities to a practitioner knowing that the doctor must be dispensing the drug illegally to addicts. The Court reaffirmed but distinguished the decision in Falcone, on the basis that the sugar and cans that the defendant in that case sold knowingly to illegal distillers were "articles of free commerce" which were not "incapable of further legal use" and which did not "have inherently the same susceptibility to harmful and illegal use." 319 U.S. at 710.

As the Sixth Circuit further noted in Superior Growers Supply, "Nor was there any close relationship [in Falcone] between defendants and a particular customer or customers alleged." 982 F.2d at 180. The Sixth Circuit thus saw a

significant parallel between Falcone and the kind of offense involved there and here. Accord, United States v. Perry, 643 F.2d 38, 47-49 (2d Cir.), cert. denied, 454 U.S. 835 (1981) (dissenting opinion of Oakes, J., announcing judgment of the Court). Fundamentally, petitioner lacked that sort of "stake in the venture" which is essential to find an intent to accomplish the ultimate customer's criminal objective. United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1939) (L.Hand, J.), aff'd, 311 U.S. 205.

The court of appeals in petitioner's case, by contrast, summarily affirmed the district court, which had upheld the indictment simply on the basis that "the government is not required to identify specific dealers who benefitted [sic] from the defendants' conspiracy in the indictment." Appx. C4. The district court relied on the majority opinion in United States v. Perry, supra, 643 F.2d at 45 ("To show a violation of 18 U.S.C. § 2 it is not necessary to identify any principal at all, provided the proof shows the underlying crime was committed by someone"; drug conspiracy conviction affirmed on theory of conspiracy to aid and abet, based on supplying of legal diluents to unidentified dealers).

The theory alleged in this indictment avoids focusing on the critical step from knowledge to intent emphasized by this Court in Direct Sales, supra:

> While it is not identical with mere knowledge that another purposes unlawful action, [the intent to further, promote and cooperate in another's intended

> illegality] is not unrelated to such knowledge. Without the knowledge, the intent cannot exist. United States v. Falcone, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 [(1940)]. Furthermore to establish the intent, the evidence of knowledge must be clear, not equivocal. Ibid. This, because charges of conspiracy are not to be made out by piling inference upon inference ....

319 U.S. at 711; accord, Anderson v. United States, 417 U.S. 211, 224 (1974).

The indictment must make legally and factually sufficient allegations, regardless of the evidence later presented to support the guilty plea. Since the alleged factual scenario of this case does not make out a legally cognizable conspiracy to aid and abet the distribution of crack cocaine, the motion to dismiss Count One, as to the 21 U.S.C. § 841 objective at least,[7] should have been granted.

The Court should grant certiorari to resolve the split between the Sixth Circuit, on the one hand, and the Second and Third, on the other, concerning the sufficiency of a theory of conspiracy to aid and abet drug distribution where the supplier of a legal product is not alleged to have the intent to promote the activities of specific, identifiable principals.

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[7] See also note 6 ante.

2. This case presents an important unresolved question of federal criminal statutory interpretation underlying what it takes to establish a factual basis to believe that property involved in a financial transaction "in fact involved the proceeds of" drug distribution, a necessary element of a money laundering charge under 18 U.S.C. § 1956.

This Court should also grant certiorari to review the Third Circuit's overbroad application of the federal money laundering statutes. To support a conviction under 18 U.S.C. § 1956(a)(1), whether after trial or (as here) by plea of guilty, there must be evidence to show that the defendant knew that the "property involved" in the challenged transaction "represents the proceeds" of unlawful activity, and that the transaction "in fact involves the proceeds of specified unlawful activity." Counts 232-291, to which petitioner also pleaded guilty, alleged that the checks he deposited (the charged transactions) were in fact "from the proceeds of specified unlawful activity, that is, the distribution of cocaine base, with the intent to promote the carrying on of the distribution of cocaine base ...."[8]

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[8] Although these counts did not use the exact statutory language, it is fair to concede that saying the checks were "from" the proceeds of crack sales is a way of alleging that their deposit "in fact involve[d]" such proceeds. The other money laundering count, #195, although predicated on a different

On appeal the petitioner challenged whether any factual basis was offered to support this element of the § 1956 offenses. In summarily affirming the convictions, the court of appeals necessarily held that the district court had a basis to believe that the charged transactions "in fact involved" such proceeds. Because no such showing was made, the entry of judgment should have been held to be an abuse of discretion under Fed.R. Crim.P. 11(f).

The court below had previously held that the "proceeds" language of § 1956 permits the funds which are the basis of a money laundering prosecution to have already changed form since coming into the hands of the drug dealer. United States v. Carr, 25 F.3d 1194, 1204-05 (3d Cir. 1994), cert. denied, 130 L.Ed.2d 643 (1995). Nevertheless, there must be proof -- or in the case, as here, of a guilty plea, a "factual basis" for believing; see Fed.R.Crim.P. 11(f) -- that the funds that were "laundered" actually were or stood in for such proceeds. The judgment below disregards the absence of any such proof in this case and thus extends far beyond any plausible reading the reach of the money laundering statute, which has become the new "darling of the prosecutor's nursery."

Merely because some money from crack dealers came into stores owned by the people to whom petitioner sold vials, it does not follow that crack proceeds necessarily flowed to petitioner, such that his

_____(cont'd)

factual scenario (a "sting"), suffers the same defect.

later disposition of those funds would constitute laundering under § 1956. There is no evidence in this record that tainted funds, whether kept separate or commingled, were passed on to petitioner. The record does not establish a basis for believing that the money actually received by petitioner either was, or that it "represented," the "proceeds" of crack sales, for two reasons. First, there is no basis for the district court to have been satisfied on this issue as a matter of fact; and second, the record is deficient as a matter of law, due to the number of steps removed those funds would be from their source in the sale of crack before reaching petitioner.

Differences of terminology between § 1956(a) and other, similar statutes show that § 1956 requires a closer tie to the original unlawful source: the terms "represents the proceeds" and "in fact involves the proceeds" as used in § 1956(a)(1) do not equate with the concept of "proceeds traceable to" the prohibited conduct, as used in the civil forfeiture statutes, such as 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981; nor to "property ... derived from specified unlawful activity," as used in 18 U.S.C. § 1957.

For this reason, "[c]ommentators have suggested that the differing terms contained in 18 USC §§ 1956, 1957, and 981 indicate that, absent unusual circumstances, 18 USC § 1956 should apply to what are determined to be direct proceeds but not to derivative proceeds of illegal activities." 2 I. Comisky, L. Feld & S. Harris, Tax Fraud and Evasion: Money Laundering, Asset Forfeiture, Sentencing ¶11.02[2][d], at 11-22 (1995). The

leading treatise agrees with this analysis of the statutory language, concluding that "proceeds" do not retain their tainted character forever, through unlimited changes of possessor, unlimited use or reuse to purchase actual products, and commingling with other funds. J. Villa, Banking Crimes § 8.03[3][a], at 8-30 to -33 (Nov. 1994 rev.).

When money is exchanged for money, or for monetary instruments in some other form, the new money certainly "represents" the old, and if the old money constituted the proceeds of a specified unlawful activity, then the new money, being simply a change of form, also "represents" such proceeds. But when the money is spent by the drug dealer or other criminal on a genuine product, then that money, in the hands of the seller of the product, no longer "represents" the proceeds of the original illegality, but rather constitutes the "proceeds" of the later sale of the product. The proper question is whether the intervening transaction represents a genuine exchange for new value, or whether it lacks economic substance. Thus, "once the property undergoes a significant change of form, Section 1956 is not to apply." Villa, id. at 8-32.[9]

In this case, the indictment alleged, and the government's factual basis proffered, that proceeds of the sale of crack

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[9] In its Memorandum and Order denying the pretrial motion to dismiss, the lower court wrote that it "d[id] not agree" with this analysis, but did not say why. Appx. C11.

cocaine were used by drug dealers to purchase new supplies of vials at retail establishments in New York and Philadelphia. But when those retailers -- who also sold many other kinds of items, legitimate and otherwise, to many other customers -- ordered more vials from their suppliers, the money they paid Belkin and Edelson, and which Belkin and Edelson gave Alexander Srebianski to give petitioner, "represented the proceeds" of the sale of vials, not of the sale of crack.

Petitioner, unlike his co-defendant Edelson, for example, did not own any retail store that sold vials directly to drug dealers. Thus, petitioner never directly received from dealers any of the proceeds of their sales of crack. Petitioner received his money from Edelson and others. Nothing in the government's change of plea memorandum, nor in its representations to the district court, indicated any factual basis for believing that the money received and banked by petitioner actually was or "represented" the proceeds of drug sales, as alleged in the indictment. There was no suggestion, for example, that the retailers kept separate the cash they received from the crack dealers, and then used that money to pay Belkin and the others for more vials, which funds Belkin or Edelson then used to pay petitioner. Nor did the indictment contain specific factual allegations on this point, so that the defendant's acquiescence in those averments might itself be understood to establish the required "factual basis." Cf. United States v. Broce, 488 U.S. 563 (1989).

The indictment did not allege that the sale of vials was the "specified

unlawful activity" whose proceeds were to be laundered. Since only drug sales, and not the sale of vials, were alleged in these counts to constitute the "specified unlawful activity" under § 1956(a),[10] the money laundering charges lacked a factual basis.

Rule 11(f) of the Federal Rules of Criminal Procedure requires that the district court satisfy itself of a factual basis for each element of the offense before entering judgment on a plea of guilty. See Libretti v. United States, 516 U.S. --, 133 L.Ed.2d 271, 116 S.Ct. 356 (1995). On this record, the district court could not properly have been so satisfied. Accordingly, the court of appeals should not have affirmed the district court's abuse of discretion in entering judgment on the guilty pleas that petitioner offered to the money laundering charges and related forfeiture.

The entry of judgment against petitioner Zhadanov on the counts charging money laundering under 18 U.S.C. § 1956

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[10] Whether the sale of vials even could constitute "specified unlawful activity" under § 1956(c) depends, first, on whether vials are a form of "paraphernalia" under 21 U.S.C. § 863 (see note 6 ante), and, second, whether sales in violation of § 863 are within the intendment of the phrase "a felony violation of ... section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia)." See Statutes Involved, ante at 6; Posters 'n' Things, supra, 128 L.Ed.2d at 546 & n.5.

was based on an extravagant extension of the reach of that statute. Certiorari should be granted to review and reverse the judgment of the Third Circuit; after such review, the judgments of conviction on Counts 195 and 232-291, and the forfeiture on Count 208 must be reversed.

CONCLUSION

For the foregoing reasons, petitioner SAM ZHADANOV prays that this Court grant his petition for a writ of certiorari, vacate the judgment below, and remand to the court of appeals, with instructions to direct dismissal of Count One and to allow withdrawal of the guilty plea on the money laundering counts.

Respectfully submitted,

By: PETER GOLDBERGER
Attorney for Petitioner

March 20, 1996.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

94-1828

UNITED STATES OF AMERICA
v.
SAM ZHADANOV,
Appellant

Appeal from the
United States District Court for the
Eastern District of Pennsylvania
D.C. Criminal No. 93-cr-000240-3
(District Judge:
Honorable Thomas N. O'Neill, Jr.)

Argued: July 26, 1995

Before: BECKER, ALITO, Circuit Judges,
and VANASKIE, District Judge.*

AMENDED JUDGMENT ORDER

After considering the contentions raised by appellant, to wit:

1. That the district court abused its discretion in imposing judgment on the plea to the money laundering counts, because one count did not state an offense, and on the others the record did not establish a legally-sufficient

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* Honorable Thomas I. Vanaskie, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

factual basis for the accusation that the money appellant received either was or "represented" the "proceeds" of "specified unlawful activity;"

2. That count 195 does not state an offense;

3. That not factual basis was established for the necessary element of the § 1956 charges that the property Mr. Zhadanov allegedly laundered "in fact involved the proceeds of" drug distribution;

4. That the district court erred in sentencing appellant under USSG § 2D1.1 (conspiracy to distribute crack) rather than USSG § 2d[sic]1.7 (conspiracy to sell drug paraphernalia) for an offense consisting of knowingly manufacturing crack vials for sale to retailers who supplied crack dealers;

5. The district court abused its discretion in imposing judgment on the plea to the conspiracy count, because the count does not state an offense;

6. The district court erred in predicating the base offense level upon a potential distribution of 10,000 kilograms of cocaine base were the court made no findings other than adoption of the pre-sentence report, which, in turn, was based upon a government estimate lacking evidentiary support; it is

ADJUDGED AND ORDERED that the Order of Judgment of the district court of August 9, 1994 be and is hereby AFFIRMED except insofar as it granted the motion for entry of a forfeiture order. The forfeiture issue is reserved so that the panel may consider the issue in light of the issues raised in the Supplemental Brief of Zhadanov filed on July 14, 1995,

and the resolution by the Supreme Court of Liberti [sic] v. United States, 38 F.3d 523 (10th Cir. 1994), cert. granted, 63 U.S.L.W. 3705 (No. 94-7427).[1]

BY THE COURT:

s/Edward R. Becker
Circuit Judge

Attest:

s/P. Douglas Sisk
P. Douglas Sisk, Clerk
OCT 31 1995

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[1] The panel invites supplemental memoranda within 10 days as to whether it would be useful to vacate the forfeiture order and remand to the district court for further development of the record or further findings, since such developments might possibly moot the Liberti [sic] issue.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

94-1828

UNITED STATES OF AMERICA
v.
SAM ZHADANOV,
Appellant

Appeal from the
United States District Court for the
Eastern District of Pennsylvania
D.C. Criminal No. 93-cr-000240-3
(District Judge:
Honorable Thomas N. O'Neill, Jr.)

Argued: July 26, 1995

Before: BECKER, ALITO, Circuit Judges,
and VANASKIE, District Judge.*

AMENDED JUDGMENT ORDER

The amended judgment order filed October 31, 1995 is hereby further amended to provide that the Order of Judgment of the district court of August 9, 1994 be and is hereby AFFIRMED in its entirety. By this order we determine the issues presented in Zhadanov's Supplemental Brief, to wit

The District Court abused its discretion in accepting the Appel-

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* Honorable Thomas I. Vanaskie, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

lant's guilt plea to the forfeiture counts.

A. The District Court violated Rule 11(F)[sic] by failing to ascertain that there was a factual basis to believe that all the listed property was legally forfeitable.

B. The District Court erred in failing to obtain a knowing and intelligent waiver of the right to jury trial on the forfeiture count.

C. The Rule 11 violations in this case "affected [the Appellant's] substantial rights."

Resolution of these issues in favor of the government is mandated by the recent Supreme Court opinion of Libretti v. United States (November 7, 1995) ___ U.S. ___, 1995 WL 648120 (1995).

BY THE COURT:

s/Edward R. Becker
Circuit Judge

Attest:
s/P. Douglas Sisk
P. Douglas Sisk, Clerk
DEC 22 1995

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO.
	:	
v.	:	
	:	
HENRY BELKIN	:	F I L E D
a/k/a "Mike"	:	
LEONARD EDELSON	:	DEC - 8 1993
SAM ZHADANOV	:	
ALEXANDER SREBIANSKI	:	MICHAEL E.
a/k/a "Alex"	:	KUNZ, Clerk
ZACHRIA GISPAN	:	By s/RS
a/k/a "Zacki"	:	Dep. Clerk
GAVRIEL GOLAN	:	
a/k/a "Gabby"	:	
ROMAN ZABIZHIM	:	
FNU KIM	:	
a/k/a "Mr. Kim"	:	93-240-03

MEMORANDUM
AND ORDER

AND NOW, this 8th day of December, 1993, upon consideration of Defendant Sam Zhadanov's Motion to Dismiss, For Discovery and a Bill of Particulars, to Suppress and Otherwise to Limit the Government's Proposed Proof and the supporting and opposing memoranda thereto, it is hereby ORDERED that:

1. Defendant's motion to dismiss is DENIED.

Defendant Zhadanov is charged with conspiracy to aid and abet the distribution of "crack" cocaine[1] and to sell drug

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[1] See 21 U.S.C. § 846. Section 846 provides: "Any person who attempts or

paraphernalia.[2] See Count One, Superseding Indictment, dated October 21, 1993.[3] He also is charged with numerous money laundering counts.[4] See Counts 195, 214 through 231, 232 through 291. In addition, the government seeks to forfeit a number of defendant's properties. See Counts 199 and 208. Currently before the Court is a comprehensive motion filed by defendant.[5]

_____(cont'd)

conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

[2] See 21 U.S.C. § 863(a). Section 863(a) provides: "It is unlawful for any person--(1) to sell or offer for sale drug paraphernalia; (2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; (3) to import or export drug paraphernalia."

[3] Any subsequent reference to an indictment refers to the superseding indictment, which was issued on October 21, 1993. This indictment superseded the original indictment issued on May 13 and unsealed on May 19, 1993.

[4] See 18 U.S.C. § 1956.

[5] When deciding a motion to dismiss the indictment, "the allegations of the indictment must be taken as true." Boyce

Defendant argues that the government may not charge Zhadanov with violating both the drug paraphernalia and the narcotics statutes because Congress intended the drug paraphernalia statute to serve as the exclusive statute for prohibiting the manufacture of crack vials.

I cannot agree. Neither statute limits the application of the other. Moreover, the legislative history cited by defendant does not support his contention that Congress intended section 863 to preempt the criminal narcotics statutes in Title 21 and to prevent the government from prosecuting an individual who sold paraphernalia in violation of section 863 under other criminal narcotics statutes in Title 21. Finally, as the government notes, because each statute requires proof of a fact that the other does not--they survive the Blockburger test. See Blockburger v. United States, 284 U.S. 299 (1932). See also United States v. DePalma, 461 F.Supp. 778, 786 (S.D.N.Y. 1978) ("A single criminal conspiracy or a single criminal act can constitute two or more separate offenses, and Congress may choose to punish each offense without offending the double jeopardy clause."). As the government explains in its response:

> A violation of Section 841(a)(1) ... requires proof that the defendant knew or intended that his actions involved the

_____(cont'd)

Motor Lines, Inc. v. United States, 342 U.S. 337, 343 n.16 (1952).

> intended distribution of a controlled substance. In contrast, Section 863 ... is violated where the defendant intentionally sold paraphernalia, and expected or should have expected that the item would be used with illegal drugs.

See Memorandum of Law in Support of Government's Response, filed November 22, 1993, at 14.

Defendant next asserts that the part of Count One of the indictment which charges conspiracy to aid and abet the distribution of crack cocaine is deficient because it neither alleges that the conspirators agreed to assist an identifiable group of drug dealers nor identifies the drug dealers whom the defendants assisted. Defendant relies on United States v. Superior Growers Supply, 982 F.2d 173 (6th Cir. 1992) to support his position.

In my view, the government is not required to identify specific dealers who benefitted [sic] from the defendants' conspiracy in the indictment. See, e.g., United States v. Orozco-Prada, 732 F.2d 1076, 1081 (2d Cir.), cert. denied 469 U.S. 845 (1984) (approving district court's conspiracy charge that did not require government to identify principal); United States v. Perry, 643 F.2d 38, 45 (2d Cir.) cert. denied 454 U.S. 835 (1981) ("The conspiracy need not be ... to aid only one identified heroin distribution network. To show a violation of 18 U.S.C. § 2 it is not necessary to identify any principal at all, provided the proof shows

the underlying crime was committed by someone.").[6]

Moreover, Superior Growers does not require the government to allege that the defendants agreed to aid and abet an identifiable group of drug dealers. It only requires the government to "tie defendant's otherwise legal activities to an unlawful offense." Superior Growers Supply, 982 F.2d at 179. Cf. Direct Sales Co. v. United States, 319 U.S. 703 (1943) (upholding conviction of mail-order drug corporation for conspiracy to violate Harrison Narcotic Act based on evidence suggesting that corporation knew of physician's illegal drug sales and intended to cooperate with him).

My review of the indictment persuades me that Count One is sufficient to withstand defendant's motion to dismiss. The indictment specifically states that the defendants conspired to aid and abet the distribution of crack cocaine, that they manufactured and sold vials to retail stores that sold the vials for crack sales and that retail stores used money from crack dealers to purchase vials from defendants. See Count One.

Defendant next contends that language in the indictment concerning narcotics distribution is unfairly prejudicial and therefore be stricken. After reviewing the indictment, I conclude that narcotics

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[6] 18 U.S.C. § 2 provides: "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal ...."

distribution allegations are relevant to the crime with which Zhadanov is charged. Accordingly, because "evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken." United States v. DePalma, 461 F.Supp. at 797.[7]

As part of his effort to remove surplusage from the indictment, defendant asserts that the overt acts set out in the indictment should be stricken because they are unnecessary to charge the defendants with a conspiracy in violation of section 846 and are "inflammatory and prejudicial." See Memorandum of Law in Support of Pre-Trial Motions, filed November 9, 1993, at 24. Alternatively, defendant requests that if the Court rejects his argument, that the Court limit the government's proof to only those acts set out in the indictment.

In my view, neither of defendant's requests are [sic] warranted. Although a drug conspiracy charge need not plead any overt acts, the inclusion of those acts does not constitute surplusage that should be stricken from the indictment prior to trial. As the Court of Appeals for the Sixth Circuit explained, "proof of overt acts committed in furtherance of the

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[7] Defendant's contention that the narcotics counts should be stricken because his conduct -- manufacturing drug paraphernalia -- is punishable only under section 863 depends on his earlier argument that section 863 preempts the other criminal narcotics statutes in Title 21, which I rejected above.

conspiracy" may be "relevant to prove the existence of the conspiracy." United States v. Thomas, 875 F.2d 559, 562 n.2 (6th Cir.), cert. denied 493 U.S. 867 (1989). At the same time, I do not believe it is proper to restrict the government to the acts described in the indictment. See, e.g. United States v. Rosenthal, 793 F.2d 1214, 1227 (11th Cir.), modified in part, 801 F.2d 378 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987) ("Nor is the government required to provide defendant with all overt acts that might be proven at trial.")

In his motion to dismiss, defendant also contends that the allegations accusing him of violating section 863 are deficient because they do not allege scienter. In United States v. Mishra, 979 F.2d 301 (3d Cir. 1992), the Court of Appeals for the Third Circuit explained:

> In our view, the deliberation called for by § 863 impinges at two points. First, when a person is charged with "sell[ing] or offer[ing] for sale drug paraphernalia," the government must show that the selling or offering for sale was intentional conduct .... The second aspect of scienter that the government would have to establish beyond a reasonable doubt inheres in the statutory definition of drug paraphernalia, i.e., items "primarily intended or designed for use" in connection with

> illegal drugs. Under § 863(d), the government may demonstrate that an item is drug paraphernalia in two ways: either by showing that an item is "primarily intended" for use with drugs or by showing that an item is "primarily ... designed for use with drugs.["]

Id. at 307 (citations omitted).

I conclude that the indictment charges defendants with the intentional conduct of conspiring to manufacture and to sell crack vials and states that the vials were intended for use with drugs or designed for use with drugs. Accordingly, the indictment's allegations of scienter are sufficient to withstand defendant's motion to dismiss.

Defendant also seeks dismissal of the numerous money laundering counts against him. Defendant is charged with numerous violations of 18 U.S.C. §§ 1956(a)(1)-(A)(i) and (1956)(a)(1)(B)(i).[8] He also

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[8] Section 1956(a)(1) provides: "Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specific unlawful activity--(A)(i) with the intent to promote the carrying on of specified unlawful activity; ... or (B) knowing that the transaction is designed in whole or in part--(i) to conceal or disguise the nature or location, the source the

is charged with one count of violating 18 U.S.C. § 1956(a)(3).[9]

According to the indictment, defendant Zhadanov

> knowing that the property involved in the financial transaction represented the proceeds of unlawful activity, did knowingly conduct financial transactions, that is, deposit checks issued from Tri-State General, Inc. [In Philadelphia, Pennsylvania] to Vortex Products Corporation for `merchandise' ... from the proceeds of specified unlawful activity, that is, the distribution of cocaine

_____(cont'd)

ownership, or the control of the proceeds of specified unlawful activity ... shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both." 18 U.S.C.A. § 1956(a)(1).

[9] Section 1956 (a)(3)(A) provides: "Whoever, with the intent to promote the carrying on of specified unlawful activity . . . conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned not more than 20 years or both."

base, and with the intent to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of the distribution of, and aiding and abetting the distribution of, cocaine base.

See Indictment, Counts 214 through 231, ¶.4. See also Counts 232 through 291 (alleging that Alexander Srebrianski and Zhadanov laundered cash through "U.S. Alexander Trading" account in New Jersey).[10]

Defendant asserts that the indictment is insufficient because it does not allege that any transactions involved the "proceeds of specified unlawful activity," that defendant did not intend to promote

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[10] In ¶.2 of these counts, the indictment states: "To launder cash received by the Belkin Crack Vial Organization from the sale of `crack' vials defendants ALEXANDER SREBRIANSKI and SAM ZHADANOV used checking account number 3053-231-7,opened in the name of U.S. Alexander Trading at National Community Bank of New Jersey, Metuchen, New Jersey. Defendant SREBRIANSKI delivered the cash to defendant ZHADANOV. Defendant ZHADANOV then returned a portion of the cash to defendant SREBRIANSKI and directed him to deposit the cash into the U.S. Alexander Trading Account. Defendant ZHADANOV then directed defendant SREBRIANSKI to write checks on the account to Vortex Products Corporation to pay defendant ZHADANOV for `merchandise.' ..."

any specified unlawful activity and that the transactions were not designed to conceal or disguise the payments.

I do not agree. In my view, the indictment is sufficient to support the money laundering charges against defendant Zhadanov. Moreover, I note that none of the cases cited by defendant in support of his arguments involved a district court's decision to grant a motion to dismiss the indictment before trial.

Defendant also asserts that the money laundering counts are insufficient because they do not allege that any of the financial transactions affect interstate commerce. Under the federal money laundering statute, a financial transaction refers to "a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." 18 U.S.C. § 1956(c)-(4)(B).[11]

Here, the money laundering counts in the indictment allege that Zhadanov deposited checks[12] and cash[13] in the National

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[11] As the Court of Appeals explained in United States v. Peay, a case cited by defendant, "[o]nly a de minimis effect on interstate commerce must be shown for the application of such a statute [referring to 18 U.S.C. § 1956] to pass constitutional muster." United States v. Peay, 971 F.2d 71, 74 (4th Cir. 1992), cert. denied 113 S.Ct. 1027 (1993).

[12] See Counts 214 through 231.

[13] See Counts 232 through 291.

Community Bank in New Jersey, a financial institution which affects interstate commerce. See, e.g., United States v. Green, 964 F.2d 365, 374-75 (5th Cir. 1992), cert. denied 113 S.Ct. 984 (1993) (the "indictment plainly alleges that banks were involved in the transactions at issue. It further delineates the specific banks involved. ... We hold ... that the allegations of the involvement of banks contained in this indictment are sufficient to reasonably appraise [defendant] of an affect upon interstate commerce.") Accordingly, I reject defendant's argument that the indictment should be dismissed for failure to allege that any of the financial transactions affect interstate commerce.

[Discussion of disposition of other motions omitted.]

s/TN O'Neill
THOMAS N. O'NEILL, JR. J.